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Supreme Court of the United States

[redacted]. Term A. D. 1966

No. 1065

EDWARD H. SMALLEY,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA.

THOMAS J. LEWIS, JR.,
905-910 Healey Building,
Atlanta, Georgia 30303,
Counsel for Petitioner.

JEAN E. JOHNSON, SR.,
Suite 505 The Savings Building,
Marietta, Georgia,
Of Counsel.

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Supreme Court of the United States

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No.

EDWARD H. SMALLEY,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA.

To the Honorable The Supreme Court of the United States of America:

Edward H. Smalley respectfully petitions this Honorable Court to grant the Writ of Certiorari to the Court of Appeals of Georgia in the above cause.

In this behalf petitioner shows unto the Court:

I.

OPINION OF THE COURT BELOW.

Southern Railway Company, Appellant v. Edward H. Smalley, Appellee, 112 Ga. App. 471 (R. 679) (See appendix to this Petition).

II.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Judgment to be Reviewed, dated September 23, 1965, (R. 679), (Appendix A), Order Denying Motion for Rehearing, dated October 19, 1965, (R. 719) (Appendix B), Order of the Supreme Court of Georgia Denying Petition for Certiorari to that Court, dated January 17, 1966, (R. 721), (Appendix C), and Order Granting a Stay of the Remittitur from the Court of Appeals of Georgia to the Superior Court of Cobb County, dated Jan. 19, 1966, (Appendix D). (R. 722.)

Statutory Provisions Believed to Confer on this Court Jurisdiction to Review the Judgment in Question. 28 U.S. Code, § 1257 (3), (Appendix E).

The rights, privileges and immunities here claimed arise under the Federal Employers' Liability Act, 35 Stat. 65, 36 Stat. 291, 53 Stat. 1404, 45 U.S. Code, §51-60. (Appendices F, G, H, and I.)

III.

THE QUESTIONS PRESENTED FOR REVIEW.

[The parties hereto will hereinafter be referred to as plaintiff and defendant as they were designated in the trial court.]

A. Did the trial court err in sustaining plaintiff's demurrers to the parts of defendant's answer which

set up as defenses to plaintiff's Federal Employers' Liability Act action:

(1) The State of Georgia's two-year statute of limitations?

(2) The State of South Carolina's statute of contributory negligence as a complete bar to recovery?

The Court of Appeals of Georgia held that it did.

B. Did the trial court err in sustaining plaintiff's objections to the allowance of defendant's amendments which sought to reinstate the defenses of Georgia's two-year statute of limitations and South Carolina's contributory negligence statute:

(1) At the close of plaintiff's case, and

(2) At the conclusion of all of the evidence, but before defendant rested?

The Court of Appeals of Georgia held that it did.

C. Was the applicability of the Federal Employers' Liability Act properly decided by the trial court, or was its applicability a jury question?

The Court of Appeals of Georgia held that this issue should have been submitted to the jury.

D. Did the trial court err in charging the jury as a matter of law that the case was being tried under the Federal Employers' Liability Act?

The Court of Appeals of Georgia held that it did.

E. In his charge to the jury, was the trial court's inadvertent omission of certain language of Georgia Code Section 38-107 without written request for a more complete charge, standing alone, error sufficient to require reversal?

The Court of Appeals of Georgia held that it was.

F. Under the allegations of plaintiff's petition, as amended, would the Federal Employers' Liability Act furnish the sole measure of the rights and liabilities of the parties?

The trial court held that it did. The Court of Appeals of Georgia held that it did not.

G. Is the decision of the Georgia Court of Appeals in the instant case in conflict with the controlling decisions of the United States Supreme Court?

Evidence was presented in proof of the material allegations of plaintiff's petition, as amended, including, of course, the interstate character of defendant's operations generally, and that plaintiff's activities at the time of his injuries were in the furtherance of defendant's business. The jury was authorized by the evidence under the law and the controlling decisions to find, and by its verdict did find, that plaintiff had made out his case as laid.

By filing demurrers to the paragraphs of defendant's answer (R. 67-70) which set up State Law defenses, plaintiff established that he was proceeding solely under the provisions of the Federal Employers' Liability Act, and the trial judge properly or-

dered defendant's State Law defenses stricken. (R. 72.)

There was conflicting evidence adduced upon the trial of the case with respect to most of the material allegations of plaintiff's complaint and these issues were properly submitted to the jury for determination. At the close of plaintiff's evidence and at the close of defendant's evidence the picture with respect to the pleadings had not been changed from what it was at the hearing on demurrers. Plaintiff proved his case as laid and the trial court correctly excluded defendant's amendments which attempted once again to reinstate State Law defenses. (R. 11, 12, 13-23 through 26.)

The trial judge properly charged the jury that the case was being tried under the Federal Employers' Liability Act (R. 168-174) and did not err in inadvertently omitting certain language of Georgia Code Section 38-107 (R. 170-171), (Appendix J), when there was no written request for a more complete charge.

In reversing the judgment of the trial court with regard to the above enumerated questions, the Court of Appeals of Georgia has rendered a decision which is in conflict with the controlling decisions of the United States Supreme Court and the United States Courts of Appeals. The decision of the Court of Appeals of Georgia is in conflict with *Bailey v. Central Vermont Railway Co.*, 319 U. S. 350, 63 S. Ct. 1062; *Gillespie v. U. S. Steel Corporation*, 85 S. Ct. 308; *South Buffalo Co. v. Ahern*, 73 S. Ct. 340, 344 U. S. 367; *Camerlin v. N. Y. C. R. Co.*, 199 F. 2d 698; *La. & Ark. R. Co. v. Pratt*, 142 F. 2d 847; *Penn. R. Co. v. Reeley*, 16 Atl. 2d 904, c. d. 61 S. Ct. 825, 312 U. S. 705;

L. & N. R. Co. v. Lunsford, 216 Ga. Rep. 289 [based on Federal decisions]; *Fla. East Coast R. Co. v. Pollack,* 154 Sou. 2d 346 [citing Federal decisions]; *Casso v. Penn. R. Co.,* 219 F. 2d 303; *Mostyn v. Del. L. & W. R. Co.,* 160 F. 2d 15; *Carney v. Pitt. & L. E. R. Co.,* 316 F. 2d 277, cert. d. 375 U. S. 814; *Ringhiser v. C. & O. R. Co.,* 77 S. Ct. 1093; *Tiller v. A. C. L. R. Co.,* 63 S. Ct. 444; *G. S. & F. R. Co. v. Meeks,* 108 Ga. App. 808 (Certiorari granted, decision reversed 84 S. Ct. 1628, 12 L. Ed. 2d 495); *S. S. Kresge Co. v. McCallion,* 58 F. 2d 931; *Cobb v. Union,* 318 F. 2d 33; *Erie R. Co. v. Winfield,* 244 U. S. 170, 37 S. Ct. 556, 61 L. Ed. 1057; *Tennant v. Peoria & P. U. R. Co.,* 321 U. S. 29; *Rogers v. Mo. Pac. R. Co.,* 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493; *Webb v. I. C. R. Co.,* 352 U. S. 512, 77 S. Ct. 451, 1 L. Ed. 2d 503; *Gallick v. B. & O. R. Co.,* 372 U. S. 108, 83 S. Ct. 659, 9 L.Ed. 2d 618; *Schulz v. Penn. R. Co.,* 76 S. Ct. 608; *N. Y. C. R. Co. v. Tonsellito,* 244 U.S. 360, 37 S. Ct. 620, 61 L. Ed. 1194; *N. Y. C. R. Co. v. Winfield,* 244 U. S. 147, 37 S. Ct. 546, 61 L. Ed. 1045, *Brown v. Western Ry. of Ala.,* 70 S. Ct. 105; *Zumwalt v. Gardner,* 160 F. 2d 298; *Urie v. Thompson,* 69 S. Ct. 1018.

IV.

STATUTES INVOLVED.

The statutes involved are:

28 U.S. Code, § 1257 (3) (Appendix E), (Page 54).

45 U.S. Code § 51 (Appendix F), (Page 55).

45 U.S. Code, § 53 (Appendix G), (Page 56).

45 U.S. Code § 54 (Appendix H), (Page 57).

45 U.S. Code § 56 (Appendix I), (Page 58).

38 Ga. Code, § 107 (Appendix J), (Page 59).

V.

STATEMENT OF THE CASE.

(a)

This action was brought in the Superior Court of Cobb County, Georgia, on August 13, 1963. It was a personal injury action brought by petitioner under the Federal Employers' Liability Act against his employer, Southern Railway Company, respondent. The original petition was brought in two counts, one alleging a violation of the Safety Appliance Act (Boiler Inspection Act), and the other based on negligence of the defendant. The petition was three times amended following orders of the trial court on defendant's demurrers. Finally, the count of the petition under the Safety Appliance Act was dismissed and the cause proceeded to trial by jury on Count One of the petition. Count Two will not be referred to herein. As finally amended, Count One of the petition alleged that on February 21, 1961, plaintiff was employed by defendant as a locomotive engineer. He resided in Cobb County, Georgia, but was to report for duty in Greenville, South Carolina, and he left Atlanta, Georgia, by rail arriving there at 3:15 A.M. Upon his arrival he was called to report for duty at 5:30 A.M. to depart from Greenville on a freight train of defendant at 6:00 A.M. with Westminster, South Carolina, as its destination. He went off duty in Westminster sometime shortly after 1:00 P.M. on February 22, 1961, and, after eating lunch in town, he returned to the caboose car which had been hauled in the train of defendant from Greenville to Westminster and which, after the train arrived, had been

parked on defendant's house track next to its depot as sleeping quarters for some of its employees, including petitioner. That during the afternoon hours he went to sleep on a bunk in said caboose, and when he awoke some while thereafter, because of the negligence of the defendant described hereinafter, he had been set afire. It was alleged in the petition that, because of defendant's negligence, there was a fuel leak in the engine that plaintiff was operating and, in the routine performance of his duties, he attempted to repair the same and in the process his clothing became saturated with Diesel fuel. Negligence was also alleged on the part of defendant in allowing the cab of the engine where plaintiff, Smalley, had to perform his duties to become greasy and oily, which further contributed to the accumulation of grease and oil in and on his clothing. Defendant was further negligent, it was alleged, in furnishing to its employees, including petitioner, a caboose car with a defective door on one end of the same which allowed gusts of wind to blow into said caboose car; in having a coal burning stove or heater as standard equipment in said caboose which had on it a defective bottom door that allowed cinders and sparks to drop out and be subject to being blown about within said caboose; in allowing the caboose car with the bunk, defective stove and defective door to be in such relationship to each other as to make the fire that did occur an immediate and imminent hazard, i.e., the door on the south end of the caboose was approximately twenty (20) feet from the north end of the bunk and the defective stove was approximately halfway between the door and the bunk. It was alleged by plaintiff that he was ex-

hausted when we went off duty in Westminster for the reason that he had had no sleep from 7:00 o'clock P.M. on February 21, 1961, when he reported in Atlanta for the trip to Greenville, until approximately 3:00 o'clock P.M. on February 22, 1961; the day was cold and windy; that plaintiff lay down on the bunk in said caboose to rest and while he was asleep gusts of wind blew in through the defective caboose car door, picked up sparks from the defective stove, blew them onto the bunk where petitioner was sleeping and, because of the grease and fuel-soaked clothing of plaintiff, he was ignited and severely burned. The burns necessitated the amputation of one leg and permanent injuries to the other. Various portions of his lower body were burned, requiring skin grafts; his bladder functions and sexual ability were impaired; he was confined to various hospitals for a total of six months; he suffered excruciating pain, physical and mental, and will continue to suffer for the remainder of his life; that he was forty-four (44) years of age at the time of his injuries with a life expectancy of 25.09 years, earning as an engineer for defendant approximately $10,500.00 per year but, on account of his injuries, he lost wages from the date of injury until the date his suit was filed in the sum of $25,375.00; that he would continue to lose wages for the remainder of his life because of the total and permanent character of said injuries. His capacity to labor and earn money has been destroyed and he has incurred itemized medical expense totalling $12,504.71.

The amended petition alleged that the defendant was a common carrier by railroad engaged in inter-

state commerce and transportation and plaintiff, as an employee of defendant, was engaged in interstate commerce or in the furtherance thereof. In addition to the negligence hereinabove set forth, the defendant was also negligent:

"(g) In failing to exercise reasonable care to furnish petitioner a safe place in which to work;

"(h) In failing to exercise reasonable care to furnish plaintiff with reasonably safe appliances, as herein alleged;

"(i) In arranging its caboose in such manner that the defective stove or heater therein was located as close to the bunk as to make the fire that did occur an immediate and imminent hazard."

Petitioner prayed for damages.

In its answer the defendant denied the material allegations of plaintiff's complaint; denied that defendant or plaintiff, Smalley, were engaged in interstate commerce, or in the furtherance thereof; alleged that plaintiff, at the time of his injuries, was not on duty with or for the defendant, and that the case did not come within the Federal Employers' Liability Act. Defendant pled the two-year statute of limitations of the State of Georgia as a bar to the action; that plaintiff was guilty of contributory negligence which, under the laws of the State of South Carolina, was a complete bar. That, even if defendant were negligent, the plaintiff, by the exercise of ordinary care, could have discovered it and avoided the consequences thereof, but failed to do so; that he

was drunk, unsteady and confused; that he sat upon the heater in the caboose; that he placed himself in such close proximity to the fire in the heater as to cause his clothes to become ignited and that such negligence on the part of the plaintiff, concurred with that of defendant, if any, and was the proximate cause of plaintiff's alleged injuries and damage. Defendant alleged that it was not negligent at the time and place complained of; that defendant's alleged negligence, which was denied, was not a proximate cause of plaintiff's injuries and damage; that the sole, proximate cause of his injuries was his failure to exercise ordinary care for his own safety; that the negligence of plaintiff was greater than any alleged negligence on the part of the defendant, and the damages to plaintiff, if any, were abated according to the comparative negligence rule; that if defendant be found guilty of neligence, plaintiff's damages must be diminished because of his contributory negligence, and finally, that the injuries and damages to plaintiff were the result of an accident.

Plaintiff filed demurrers to certain portions of defendant's answer. (R. 67-70.) The trial court sustained these demurrers and required defendant to redraft its answer (R. 72) eliminating the following portions, (R. 59 to 62):

> Sub-paragraph (a) of paragraph 21 of the answer which alleged the caboose was not in interstate commerce;
>
> Sub-paragraph (a) of paragraph 22 which invoked the Georgia statute of limitations of two years;

Sub-paragraph (b) of paragraph 22 which alleged that the action was barred by the contributory negligence of the plaintiff under South Carolina law;

Sub-paragraph (f) of paragraph 22 which alleged comparative negligence barred the action and abated the damages;

Sub-paragraph (g) of paragraph 22 which alleged the injuries were the result of an accident.

The case proceeded to trial on the issues presented in Count One of the amended petition and the redrafted answer of the defendant. Evidence was presented by plaintiff and after he rested defendant made a motion for non-suit, which was overruled by the Court. Defendant then presented evidence, rested, and made a motion for directed verdict, which was denied by the Court. (R. 15.) At the close of plaintiff's evidence defendant offered amendments in which the same defenses which had previously been stricken on demurrer, i.e., Georgia's two-year statute of limitations and South Carolina's contributory negligence statute, a complete bar to a recovery. The same two amendments were again tendered by the defendant after its last witness had testified but before the evidence was closed. In both instances the trial court sustained objections by counsel for plaintiff and disallowed the amendments. (R. 12-14.)

After argument of counsel and the Court's charge, the jury retired and. after deliberation, returned a verdict for plaintiff. (R. 136.) This verdict was made the judgment of the Court, (R. 137), and, thereafter, the defendant filed its motion for new trial, (R.

138-139), later amended, (R. 145) and, in the alternative, a motion for judgment notwithstanding the verdict. (R. 138.) After argument and submission of briefs, both motions were denied by the Court on the 1st day of February, 1965. (R. 675-676.)

Defendant filed its Bill of Exceptions in the Court of Appeals of Georgia (R. 4 through 30) and, on September 23, 1965, the Court of Appeals handed down an opinion (R. 679) which overruled defendant's motion for judgment notwithstanding the verdict and the general grounds of its motion for new trial, but reversed the trial court's judgment on certain of the grounds of defendant's motion for new trial, as amended.

Plaintiff, Smalley, filed a motion for rehearing which was denied. (R. 719.) The Supreme Court of Georgia denied Smalley's petition for certiorari. (R. 721.)

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THIS WRIT.

The defendant might raise the point that the judgment of the Court of Appeals was not a final judicial determination of this case . . . It granted a new trial. But the opinion of the Georgia Court of Appeals *is final* insofar as the law of the case is concerned, and it is in conflict with the Federal statutes and decisions and for this reason it should be reviewed and reversed. Assuming, though, that it was not "absolutely final," this Court has held that it would review judgments less than final.

Gillespie v. U. S. Steel Corporation, 85 S. Ct. 308(3).

"In deciding questions of finality within statute permitting appeals from all final decisions of the district courts, the most important competing considerations are the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other."

The decision of the Court of Appeals of Georgia affirmed the trial court's judgment overruling defendant's motion for judgment notwithstanding the verdict. (R. 696.) The effect of this was to find that the evidence on the issues of negligence and proximate cause did not demand a verdict for the defendant. The Court of Appeals, however, *did not* rule on the general grounds of defendant's motion for new trial. (R. 697.) If the evidence did not demand a verdict for the defendant, it necessarily follows that there was evidence from which the jury could find: defendant negligence, proximate cause, interstate commerce, employment at the time of injury, damages, or, in effect, a case made out under the Federal Employers' Liability Act and a basis for a verdict for plaintiff. If there was evidence to support a verdict for the plaintiff under his pleadings, then the verdict could not be:

(a) "Contrary to law and the principles of equity and justice;"

(b) "Contrary to the evidence in said case and without evidence to support it;" and

(c) "Decidedly and strongly against the weight of the evidence."

These [(a), (b), (c), above] were defendant's general grounds of its motion for new trial upon which the Court of Appeals did not pass but, in holding as it did, it necessarily had to find that the verdict of the jury could be proper: that plaintiff had made out a case under his Federal Employers' Liability Act petition and, if a verdict was not demanded for the defendant, then it necessarily follows that the Court of Appeals would have had to find that the verdict was not necessarily contrary to the evidence or law. Nevertheless, it expressly did not rule on these general grounds of defendant's motion for new trial, but has left its door open for a duplication of the expensive, time-consuming and unjust multiple appeal as it did in *G.S. & F.R. Co. v. Meeks,* 108 Ga. App. 808, 134 S.E. 2d 555, certiorari granted 84 S. Ct. 1628; second opinion of Court of Appeals 110 Ga. App. 143, 137 S.E. 2d 919, and plaintiff respectfully asks that the United States Supreme Court decide this issue when reviewing the other points of error outlined herein. [For further explanation, see pages 29 and 30 of this petition.]

POINT A.

The Court of Appeals erred in holding:

(a) That the State of Georgia's two-year statute of limitations, and

(b) That South Carolina's statute of contributory negligence (a complete bar to recovery) were improperly ruled out of the pleadings by the trial court.

In Federal Employers' Liability Act actions the Federal statutes (45 U.S. Code, §§ 51-60) furnish the exclusive remedy to an employee of a railroad engaged in interstate commerce who is injured by reason of the negligence of his employer. Georgia's two-year statute of limitations is superseded by 45 U.S. Code, § 56 (Appendix I):

> "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued . . ."

Smalley was injured on February 22, 1961; his cause of action was filed in the Superior Court of Cobb County, Georgia, on August 13, 1963, less than three years from the date he was hurt.

Georgia's two-year statute of limitations applies to common law tort actions, but not Federal Employers' Liability Act actions.

South Carolina's contributory negligence statute is superseded by 45 U.S. Code, § 53 (Appendix G):

> "In all actions hereafter brought against any common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee . . . the fact that the employee may have been guilty of contributory negligence shall not bar his recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . ."

The following authorities sustain plaintiff's position with respect to Point A:

"In actions for personal injuries under this chapter *remedy given by this chapter is exclusive and all state laws are superseded insofar as they attempt to cover the same field.*" [Emphasis added.]

L. & A. R. Co. v. Pratt, [*supra*].

"The rights which the Federal Employers' Liability Act creates are *'federal rights' protected by federal rather than local rules of law . . .*" [Emphasis added.]

Bailey v. Central Vt. Ry. Co., [*supra*].

". . . 46 U.S. Code, §688, commonly known as the Jones Act . . . *provided exclusive right of action* for the death of seamen killed . . . It provided the same remedy for injury or death . . . that was and is provided for railroad workers in the Employers' Liability Act."

Gillespie v. U. S. Steel Corporation, [*supra*].

"We do not doubt that the Federal Employers' Liability Act supplanting a patchwork of state legislation with a *nationwide uniform system* of liberal remedial rules *displaces any State law trenching on the province of the Act.*" [Emphasis added.]

South Buffalo Co. v. Ahern, [*supra*].

"Remedy afforded by Federal Employers' Liability Act for death of railroad employee is paramount and exclusive."

Penn. R. Co. v. Reeley, [*supra*].

POINT B.

The Court of Appeals of Georgia erred in holding that the trial court erroneously disallowed defendant's amendments which sought to reinstate its State Law defenses.

This case was just as much under the Federal Employers' Liability Act at the conclusion of the evidence as it was during the argument on demurrer. The rights of a railroad employee injured while employed in interstate commerce are ". . . federal rights protected by federal rather than local rules of law . . ." *Bailey v. Central Vt. R. Co., supra.*

Under the pleadings in this case no "issuable defenses" were disallowed by the trial court. Plaintiff pled and proved employment, interstate commerce, negligence of the defendant, and injury as a proximate cause thereof. His only remedy was an action under the Federal Employers' Liability Act. To recover, as defendant contends he would be authorized to do (under a common law tort action), his pleadings would necessarily have had to include matter which *was not* included. For instance, that he was an invitee or licensee. This was not the case, of course, and the trial court properly ruled on defendant's pleadings (on demurrer) and its amendments.

The situation in the case at bar is similar to that which existed in the case of *Casso v. Penn. R. Co., supra.*

> "Railroad employee who did not work on day following payday and on next succeeding day was injured while returning to his company-

provided housing and while within a car length of car in which he was housed, was in railroad's employment at time of injury and within protection of the Federal Employers' Liability Act."

In *Carney v. P. & L. E. R. Co., supra,* the railroad provided sleeping quarters for its employees at an outlying point at the YMCA and an employee was injured by a defecitve bed *while off duty.* He was covered by the Federal Employers' Liability Act.

In *Mostyn v. D. L. & W. R. Co., supra,* the Court held:

"It seems to us that when a railroad provides shelter or food, or both, for its employees and they are using the accommodations so provided to prepare themselves for their work or rest and recuperation, they must be regarded as in its employ."

In *Ringhiser v. C. & O. R. Co., supra,* an engineer who was on a personal mission was held to be covered by the Federal Employers' Liability Act when he sustained injury. He had left his regular place of work *on an engine* and was in a gondola car where he had gone to answer a call of nature. The gondola car was struck by another car in switching operations. Defendant in the *Ringhiser* case knew of the custom and practice of its employees to use the gondola car for this purpose and, therefore, owed to its employees the duty to exercise ordinary care for their safety under these circumstances. The Southern Railway, in the case at bar, knew of the custom and practice of its employees,

at outlying points, to use caboose cars for the purpose the one in question was being used by Edward Smalley. (R. 341-397.)

Brown v. Western Ry. of Ala., supra, supports petitioner's position in Points A and B.

> "Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws."

Further in support of Points A and B, plaintiff sets out hereinafter certain portions of the testimony in said case with respect to plaintiff's presence in Westminister, South Carolina, being in the furtherance of defendant's business. Smalley testified (R. 218):

> A. "Well, if they was to need you in the case of emergency, they'd have to use you before the set time for you to go to work the next morning."
>
> Q. "Do they have to make any call to a crew in order to fill the assignment for the next day's work?"
>
> A. "No, sir, they have no call boys there."
>
> Q. "What is the purpose of having these men stay in this outlying point overnight rather than return to their homes?"
>
> A. "For the convenience of the company."

With reference to interstate commerce, Smalley testified (R. 214) that the Southern Railway Company serves an area including, at least, "Atlanta to Washington, D. C.," that the train had cars in it that came from other States (R. 215). That the caboose car in question was carried along with the train and

used for the purpose it was being used when Smalley was injured is shown in the testimony of J. C. Cranshaw, brakeman on the crew. (R. 340.)

Q. "What is the purpose of having the bunks in there?"

A. "Well, the bunks—that is just on the side to watch the train."

Q. "Are they arranged so you can lie down and rest on them?"

A. "Well, you can lie down, yes."

Q. "Have you ever taken a nap on one of those bunks?"

A. "Yes, sir." (R. 341.)

Q. "Have you ever known of yourself doing it—or other trainmen—staying on the caboose as living quarters when you were in outlying points?"

A. "Yes, sir."

Q. "Sir?"

A. "Yes, sir, they stay on at night, some of them."

Defendant's counsel tried to bring out on cross-examination that there was a rule against enginemen (such as Smalley) going on cabooses for any purpose. Cranshaw testified on this point (R. 358):

Q. "Now the members of the train crew, those of the train group, were permitted to go off and on the caboose from time to time. . . weren't they?"

A. "Yes, sir."

Q. "But there is another rule that applied to enginemen, wasn't there, that this was not available to the enginemen?"

A. "I don't think so."

And on re-examination by plaintiff's counsel, Cranshaw testified (R. 376):

Q. "Is there a rule against them going on it?"

A. "Not as I know of, as a rule."

Q. "Is it unusual for an engineman or fireman other than the engineer to go on a caboose when it's at an outlying point?"

A. "No, sir."

Q. "Have you ever seen this happen before this occasion?"

A. "Yes, sir."

Q. "A few times or many times?"

A. "Several times."

Q. "Many or a few?"

A. "Come into the caboose, the engine crew?"

Q. "Yes, sir."

A. "They come on often."

Q. "Would you say it's customary?"

A. "Yes, sir."

J. I. Johnson, trainman in Smalley's crew, testified on this same question: (R. 397)

Q. "Have you ever heard of an engineer or a fireman going onto a caboose?"

A. "Yes, sir."

Q. "Is it or not common practice for them to use the caboose?"

A. "Well, now, on the rule, I don't know that, but I know the trainmen, brakemen, flagmen

and conductor use it, but now I know of cases where the fireman and engineer stayed on it."

Q. "Is that a frequent occurrence, did it happen frequently that they used them?"

A. "Oh, yes. Now nobody never stayed on that one at Westminster."

The above quoted testimony from the record shows clearly that:

(1) The parties were engaged in interstate commerce or the furtherance thereof;

(2) Smalley's activities at the time of his injuries were in the furtherance of the master's business so as to place him within the coverage of the Federal Employers' Liability Act;

(3) At the time of his injuries, Smalley was using the caboose for one of its intended purposes.

There was ample evidence of negligence on the part of the defendant. Even the exhibits that defendant offered showed clearly the complained-of defects in the caboose car. Exhibits 9 and 7, (R. 670-668), showed the door on the south end of the caboose propped shut with a board. Exhibit 10, (R. 671) showed the defective bottom door of the stove propped shut with a "brass." It also showed the ashes and coals lying unenclosed in the bottom part of this stove. Exhibits 1 and 7, (R. 657-668) shows clearly the relationship each to the other of the bunk, stove, and door on the south end of the caboose.

There was ample evidence of defendant's negligence from witnesses other than the plaintiff, himself. J. C. Cranshaw, head brakeman of the crew, testified: (R 340)

Q. "Had you been in that caboose on other occasions?"

A. "Yes, sir."

Q. "Is that carried along with the train as standard equipment?"

A. "Yes, sir." (R. 342.)

Q. "Did you notice anything irregular or unusual about either one of the doors on this caboose as to its ability to be closed tightly?"

A. "The one—well, on the south end door, you had to keep it propped while the caboose was in motion."

Q. "Propped with what?"

A. "With a board."

Q. "Why would you have to prop it shut?"

A. "Well, the wind would blow the door open."

Q. ". . . Are the doors on caboose cars supposed to stay shut when you shut them, or do they spring free?"

A. "No, sir, they close."

Q. "What I mean, are they supposed to stay closed?"

A. "Yes, sir." (R. 343.)

Q. "While the caboose is moving, why did you have to prop the board against it?"

A. "To keep it closed."

Q. "Is that normal and customary on caboose cars?"

A. "Well, no, sir."

Q. (R. 344.) ". . . What kept the door from staying closed by itself?"

A. "It is a bad latch on the door."

Q. "Bad latch?"

A. "Yes, sir."

Further, Cranshaw testified about the defective door on the stove in the caboose: (R. 345)

Q. "Did you notice anything about the bottom or ash door, if that is what you want to call it, on that little stove?"

A. "Did I notice it?"

Q. "Yes, sir."

A. "I didn't pay any attention to it."

Q. "Would it stay shut?"

A. "We had a brass there to keep the door closed when. . ." (R. 346.)

Q. "Was that on it holding the door closed on this stove on that day?"

A. "I didn't notice."

Q. "Would the door on that stove stay shut by itself?"

A. "No, sir."

Cranshaw also testified that the condition of the door of the caboose and the door on the stove had existed for some good while before the occurrence complained of. (R. 346.) (R. 347.)

J. I. Johnson, the flagman on the job, regularly rode on this same caboose and testified that the defective condition of the door and stove had existed prior to the occurrence complained of. (R. 394.) Referring to the bottom door of the stove: (R. 395)

Q. "That it may have been broken off?"

A. "May have been broken."

Q. "What would make you think that it may have been broken off?"

A. "Well, by that brass being there."

Q. "By the brass being there, you think that it might have been broken off?"

A. "Yes, sir." (R. 396.)

Q. "Do you recall the door on this caboose at the . . . south end of the caboose, anything that was wrong with that door?"

A. "Well, in motion I had to keep it propped with a plank, yes, sir."

Q. "Was that the normal and customary thing, to keep something propped against a caboose car door?"

A. "Well, the latch wouldn't hold the door when you were running against the wind."

Q. "Was the latch in good condition, or not?"

A. "Well, it wouldn't hold it. . ."

Q. "Say, the way a latch is supposed to?"

A. "Well, a good latch, I mean, is supposed to hold one."

There was testimony regarding Smalley's injuries by him and his two primary treating physicians. Testimony was introduced regarding his special damages.

Smalley's case was proved as laid in his petition, as amended, under the Federal Employers' Liability Act.

POINT C.

The Court of Appeals erred in reversing the trial court on the ground that he did not submit to the jury, but decided as a matter of law, that the Federal Employers' Liability Act was the applicable law in this case.

Defendant's position is that, since under Georgia Law a plaintiff does not have to set forth in his petition the law under which he is proceeding, if plaintiff failed to make out a case under the Federal Employers' Liability Act, he could make one out under State Law and its State Law defenses would be good. That, therefore, it was a jury question as to what law applied. This is untenable. Under this theory defendant could have filed defenses to a divorce action or a suit on a note and the Court would have had to submit those issues to the jury for determination of the "legal question." Whether he had to or not, plaintiff made his election to proceed under the Federal Employers' Liability Act when he filed demurrers to defendant's answer. (R. 67 et seq.) If it were not the duty of the trial court to decide questions of law, what authority would the Court have to make a ruling on a demurrer, motion for directed verdict, or for judgment notwithstanding the verdict?

In *Peresipka v. E. J. & E. R. Co.*, 217 F. 2d 183 (1), the Court held *as a matter of law* that the Federal Employers' Liability Act applied and so instructed the jury.

In *Southern Railway Company v. Cabe*, 136 S. E. 2d 438 (4), the Court held in that Georgia case that the trial court properly decided a question of law by directing the jury to return a verdict for the plaintiff. It was reversed on other grounds.

That the applicability of the Federal Employers' Liability Act is a question of law to be decided by the Court rather than a question of fact for the jury has been approved in the following cases: *Casso v. Penn. R. Co., supra; Mostyn v. D. L. & D. W. R. Co., supra; Carney v. P. & L. E. R. Co., supra; Ringhiser v. C. & O. R. Co. supra; Morris v. Penn. R. Co.*, 187 F. 2d 837.

POINT D.

The Court of Appeals of Georgia erred in reversing the trial court on the ground that it improperly charged the jury that, as a matter of law, the case was being tried under the Federal Employers' Liability Act. This charge was correct and the trial court should not have been reversed. It is true that, under Georgia law, pleadings do not have to be designated, nor does it have to be specified under what law the case proceeds, but certainly a defendant has no right to insist that a plaintiff proceed under some laws which defendant chooses! The pleadings in this case were thrashed out in several pre-trial hearings and it was well settled that plaintiff was proceeding solely under the Federal Employers' Liability Act. How then could the trial court charge other than it did?

The amended petition alleged a Federal Employers' Liability Act case and there was evidence submitted to prove the allegations therein. The jury was fully charged on all the pertinent points of law and evidence. It was left to the jury to decide all questions presented by the pleadings and evidence. There was nothing in plaintiff's amended petition alleging a cause of action under any theory but the Federal Employers' Liability Act. It was necessary for the Court to charge that the case was brought under the Federal Employers' Liability Act because it was! The jury could have found that a case under the Federal Employers' Liability Act was not made out and [redacted] verdict would have been for defendant. Plaintiff had to stand or fall on the Federal Employers' Liability Act; he had a Federal Employers' Liability Act case or none at all.

For the above reasons and by authority of cases heretofore cited, the decision of the Georgia Court of Appeals should be reversed.

POINT E.

The Court of Appeals erred in holding that the trial court committed reversible error in inadvertently omitting certain language when charging Georgia Code Section 38-107. This statute is set out in Appendix J. The language inadvertently omitted appears in quotes hereinafter.

In charging on the preponderance of the evidence, the trial court did not include . . . you may also consider "their intelligence." It omitted: "The jury

may also consider the number of witnesses, though the preponderance is not necessarily with the greater number."

Were these omissions, *standing alone,* error which would require reversal of the judgment? We think not. Neither did the defendant until after the verdict. Under the Georgia law, as it existed at that time, there was no requirement that counsel make objections to the charge at its conclusion, but in this instance the Court asked counsel if there were corrections or additions that should be made and defense counsel was silent. If this "reversible erroneous omission" (as defendant called it) was so overwhelmingly influential in swaying the jury, surely counsel would have made mention of it at that time. The court reporter did not record this colloquy between the Court and counsel but, by reference to the record, pages 206-207, it is readily seen, by implication, at least, that the conversation did take place.

Further, it should be noted that defendant's counsel made no written request for more complete charge.

In *Yellow Cab Co. v. McCullers,* 98 Ga. App. 601, 106 S. E. 2d 535, the Court stated:

> "While both the Supreme Court and this court have held that the better practice in charging on this section is to instruct the jury with respect to all of the elements set forth in the Code Section, nevertheless, it is not the intention of this rule as announced by the courts that the judges should in every instance charge the entire sec-

tion (cases cited). It is not always reversible error to omit from the charge some of the elements of this Code Section. [38-107] (cases cited.)"

See also: *Betsill v. The State, 98 Ga. App. 695 (4) 106 S.E. 2d 323.*

"In the absence of a timely written request, the trial court did not err in failing to instruct the jury with respect to weight and credit to be given expert testimony. (cases cited.)"

The Court held similarly in:

Williams v. Southern Ry. Co., 99 Ga. App. 503, 109 S. E. 2d 343 and
Southern Railway System v. Yancey, 102 Ga. App. 159, 115 S. E. 2d 693;
Chandler v. Ala. Power Co., 104 Ga. App. 521, 122 S. E. 2d 317.

[Reversed by Supreme Court on other grounds.]

The three above-cited decisions dealt with a charge on the same Code Section, 38-107.

The Court held in *Southern Railway System v. Yancey, supra:*

"Though the better practice is to charge the entire Code Section, we do not feel that the inadvertent omission was harmful."

This omission was not harmful; was not reversible error.

In *S. S. Kresge Co. v. McCallion, supra,* the Court held:

"The charge must be construed as a whole and the overall impression conveyed by it to the jury."

This ruling was followed in *Cobb v. Union,* 318 F. 2d 33.

Viewing the trial court's charge as a whole, the omission of the complained-of language "standing alone" could not have been the factor which swayed the jury from a defendant's verdict to one for the plaintiff.

For the above reasons the Court of Appeals' decision in this case should be reversed.

Plaintiff fully realizes that a trial court's charge according to standard practices in that State does not normally present a question reviewable by the United States Supreme Court. However, this Court frowns on and advocates the avoidance of multiplicity of appeals. *Gillespie v. U.S. Steel Corporation,* 85 S. Ct. 308 (3). In *Meeks v. G. S. & F. Ry. Co.,* 108 Ga. App. 808. 134 S. E. 2d 555, the Court of Appeals reversed the trial Court. The United States Supreme Court granted certiorari, 377 U. S. 405, 84 S. Ct. 1628, and reversed the Georgia Court of Appeals. The Court of Appeals then reopened the case for further briefs *and again reversed the trial court* on one of defendant's grounds of motion for new trial which the Court of Appeals had not ruled on when the case was before it originally. 110 Ga. App. 143, 137 S. E. 2d 919.

It is in an effort to avoid such an expensive and time-consuming procedure as above outlined that plaintiff asks this Court to rule on Point E of his petition at the time the other matters set out in his petition are reviewed.

POINT F.

The Court of Appeals of Georgia erroneously held that the Federal Employers' Liability Act *did not* furnish the sole measure of the rights and liabilities of the parties. This is in conflict with the following decisions and must be reversed:

Gillespie v. U. S. Steel Corporation, [*supra*];
Penn. R. Co. v. Reeley, 16 Atl. 2d 904, c.d. 61 S. Ct. 825, 312 U. S. 705;

"Remedy afforded by Federal Employers' Liability Act for death of a railroad employee is *paramount and exclusive.*" [Emphasis added.]

Graham v. Thompson, 212 S. W. 2d 770;

"Rights and liabilities of parties to an action within Federal Employers' Liability Act must be determined by that Act alone." [Emphasis added.]

Sou. Pac. Co. v. Clayton, 81 S. W. 2d 788.

"Federal Employers' Liability Act held to furnish sole and exclusive measure of rights and liabilities of parties. . ." [Emphasis added.]

For similar holdings see:

Hoepfner v. Northern Pac. R. Co., 61 F. Supp. 819;
Phillips v. Houston Fire & Cas. Ins. Co., 219 F. Supp. 420;
Bowen v. N. Y. C. R. Co., 179 F. Supp. 25.

Relying on Federal decisions cited therein, the Georgia Supreme Court held in *L. & N. R. R. Co. v. Lunsford*, 216 Ga. Rep. 289:

> *". . . Congress in passing the Federal Employers' Liability Act pre-empted that field of legislation and excluded all remedies which might be resorted to for injuries to employees other than those provided for by such Act."* [Emphasis added.]

Florida courts have adhered to this principle.

F. E. C. Ry. Co. v. Pollack, 154 Sou. 2d 346.

> *"No State statute, law or other enactment can enlarge or contract the operation of this chapter* and rights and liabilities arising thereunder.
>
> *"This chapter exclusively covers entire field* under which railroad engaged in interstate commerce and substantiye rights and obligations of one suing under the section depend upon the section and applicable common law principles as interpreted by Federal Courts." [Emphasis added.]

Plaintiff feels that this Court will take judicial notice that the Southern Railway Company is a carrier engaged in interstate commerce. In his petition, as amended, plaintiff alleged that the Southern Railway was engaged in interstate commerce and that he (plaintiff) was engaged in the furtherance of interstate commerce. Proof was submitted in support of said allegation. 45 U. S. Code, § 51 provides, in part:

> *"Any employee of a carrier any part of whose duties as such employee shall be the furtherance of interstate commerce, or shall closely and substantially*

affect such commerce . . . . shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and *shall be considered as entitled to the benefits of this chapter.*" [Emphasis added.]

Under the *Casso, Carney* and *Mostyn* cases cited hereinbefore, Smalley was employed when injured; was "entitled to benefits of this chapter." The Federal Employers' Liability Act *did* provide the sole measure of the rights and liabilities of the parties. The Georgia Court of Appeals' decision holding contrarily should be reversed.

POINT G.

The decision of the Georgia Court of Appeals in this case is in conflict with the controlling decisions, not only of the United States Supreme Court and the Federal Courts of Appeal, *but is even contrary to its own decisions.*

The United States Supreme Court has many times held that decisions in Federal Employers' Liability Act cases must be uniform throughout the United States. If the decision of the Georgia Court of Appeals in this case is not reversed by the United States Supreme Court, it will have the effect of holding that Georgia is the exception to this rule.

CONCLUSION.

The Georgia Court of Appeals has drifted about as far as it could possibly do in rendering the decision in this case. It is contrary to every principle set forth in the Federal Statutes (45 U. S. Code, §§ 51-60) and to hundreds of decisions handed down by

courts throughout the land. If allowed to stand, it will set Georgia apart from the rest of the United States as the one State where Federal Statutes need not be complied with. It will ". . . take away a goodly portion of the relief which Congress has provided them." *Bailey v. Central Vt. R. Co., supra.*

It is respectfully urged that this Court, for the reasons stated herein, reverse the decision of the Georgia Court of Appeals and reinstate the verdict and judgment of the trial court.

Respectfully submitted,

THOMAS J. LEWIS, JR.,
Attorney for Petitioner.

905-910 Healey Building,
Atlanta, Georgia 30303.

CERTIFICATE OF SERVICE.

This is to certify that I have this day served Messrs. Matthews, Maddox, Walton & Smith, attorneys for Respondent, P. O. Box 29, Rome, Georgia, with a copy of the Petition for Writ of Certiorari and Appendices in the above stated case by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This ..... day of ....., 1966.

THOMAS J. LEWIS, JR.,
Attorney for Petitioner.

APPENDIX A.

41341. SOUTHERN RAILWAY COMPANY v. SMALLEY.

Before the Federal Employers' Liability Act is applicable to a suit for damages brought by a railroad employee against his employer, it is essential not only that the plaintiff was an employee of the defendant railroad engaged in the furtherance of interstate commerce but that such employee was engaged in activities incident to or an integral part of his employment at the time of the injury complained of.

Argued June 7, 1965—Decided September 23, 1965—Rehearing Denied October 19, 1965.

Federal Employers' Liability Act. Cobb Superior Court. Before Judge Henderson.

This was a suit brought by the plaintiff, a railroad engineer, against his employer, the Southern Railway Company, to recover damages under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., for injuries sustained as a result of the alleged negligence of the defendant railroad when the plaintiff was severely burned while sleeping during off-duty hours in a caboose parked overnight at an outlying point in Westminster, South Carolina. The defendant in its answer to the petition denied that the Federal Employers' Liability Act was ap-

plicable to this suit and asserted several affirmative defenses, including a plea of the Georgia statute of limitation, which were applicable if the Federal Employers' Liability Act did not apply. The trial court sustained the plaintiff's demurrers to that part of the defendant's answer in which these issues were raised and ordered said defenses stricken.

This case then proceeded to trial and, at the conclusion of the evidence, the defendant attempted to amend its answer to reinstate these defenses, but said amendments were disallowed by the court. The defendant then filed a motion for a directed verdict which was denied. The case then proceeded to the jury, and a verdict was returned for the plaintiff. The defendant then made a motion for a judgment notwithstanding the verdict in accordance with its previous motion for a directed verdict, and, in the alternative, a motion for new trial which was amended by the addition of several special grounds. These motions were denied and the exception is to this judgment and to the antecedent orders of court overruling certain of the defendant's demurrers to the plaintiff's petition, sustaining the plaintiff's demurrers to the defendant's answer and refusing to allow the defendant to amend its answer at the close of the evidence.

Scott S. Edwards, Jr., Matthews, Maddox, Walton & Smith, for plaintiff in error.

Jean E. Johnson, Sr., T. J. Lewis, Jr., contra.

JORDAN, Judge. 1. The trial court did not err in overruling the grounds of special demurrer to the

petition of which complaint is made by the defendant. The allegations of the petition which was thrice amended in response to the defendant's demurrers were sufficiently definite to apprise the defendant of the plaintiff's contentions and to enable it to prepare its defense, and it was not necessary for the plaintiff to plead evidence in support of his allegations of ultimate fact. "Good pleading requires only that the plaintiff plainly and concisely state the material ultimate facts upon which she depends for a recovery. As a general rule, the evidentiary facts upon which the plaintiff relies to prove the ultimate facts need not and should not be set forth in the pleadings." *Lefkoff v. Sicro,* 189 Ga. 554 (10) (6 SE2d 687, 133 ALR 738); *Tanner v. National Cas. Co.,* 214 Ga. 705 (1b) (107 SE2d 182).

2. (a) Before the Federal Employers' Liability Act is applicable to a suit for damages brought by a railroad employee against his employer, it is essential not only that the plaintiff was an employee of the defendant railroad engaged in the furtherance of interstate commerce but that such employee was engaged in activities incident to or an integral part of his employment at the time of the injury complained of. Quirk v. New York, C. & St. L. R. Co., 189 F2d 97; Atchison, T. & S. F. R. Co. v. Wottle, 193 F2d 628; Baum v. Baltimore & Ohio R. Co., 256 F2d 753.

As stated in the Wottle case, supra, the Federal Employers' Liability Act covers only those acts which are necessarily incidental to actual work performed in interstate commerce, such as going to

and from the actual place of work after reporting for duty, and temporary departure from the line or course of duty, but does not cover activities not necessarily incident to or an integral part of employment in interstate commerce, such as those undertaken for a private purpose and having no causal relationship with employment.

In this case the United States Court of Appeals, Tenth Circuit, held that where a section hand who lived in a bunk house maintained by the railroad on a main railroad line and who provided his own food and bedding, about an hour after quitting time, left the bunk house in his automobile to procure bedding and groceries for use in the bunk house, and his automobile was struck by an engine while crossing tracks of the main line, the employee's mission was unrelated to employment and the injury was not sustained in commerce, and the railroad was accordingly not liable under the Federal Employers' Liability Act. Likewise, in the Quirk and Baum cases, supra, it was held that an employee who is injured while engaging in a personal mission unconnected with his employment during off-duty hours is not within the scope of the Federal Employers' Liability Act.

It is thus clear from these decisions that the defendant railroad in this case had the right to assert and prove that the Federal Employers' Liability Act was not applicable here for the reasons alleged in paragraph 21(c) of its original answer, in which it was alleged that the plaintiff at the time he was injured was not on duty with the defendant and

was not engaged in any act, duty, service or work of or for the defendant or which was a necessary incident of his work for defendant or imposed upon him by his employment, and was not acting within the course or scope of his employment. This being true, the defendant railroad also had the right to set up as a complete bar to this action the applicable statute of limitation of this State, and the contributory negligence law of South Carolina, the State where the accident occurred, conditional upon proof of the non-applicability of the Federal Employers' Liability Act which of course prohibits these defenses.

The trial court erred therefore in sustaining the plaintiff's demurrers to paragraph 22 of the defendant's original answer in which these conditional defenses were set up; and such erroneous judgment not only deprived the defendant of the right to prove substantial defenses to this action, including the absolute bar of the statute of limitation, but also deprived the defendant of the right to have its plea of the bar of the statute of limitation tried before the issue of liability, in which event the question of the applicability of the Federal Employers' Liability Act could be ascertained separate and apart from the question of negligence, thereby greatly simplifying the determination of the issues in this case. *Coggins v. Edmonds*, 209 Ga. 381 (73 SE2d 199); *Gamble v. Gamble*, 204 Ga. 82 (2) (48 SE2d 540); *Code Ann.* § 81-1002.

(b) The original error of the trial court in striking these defenses was sufficient in itself to render

the subsequent trial of this case nugatory (*Wilson v. Tumlin*, 103 Ga. App. 654 (120 SE2d 196); *National Life & Acc. Ins. Co. v. Chapman*, 106 Ga. App. 375 (127 SE2d 157)); however, after the introduction of evidence, the defendant moved to amend its answer and reinstate these defenses, and the trial court compounded its original error by denying this motion. The necessary effect of this second ruling was, (1) that the defendant had no right to assert the inapplicability of the Federal Employers' Liability Act or, (2) that the evidence demanded a finding as a matter of law that the Federal Employers' Liability Act was applicable to this suit. In either event, the ruling was erroneous, as the issue of whether or not the plaintiff was engaged in the course of his employment at the time of injury was clearly a question for the jury under the record before the court at the time of the second ruling.

The jury was authorized to find that the plaintiff went off duty at 1:15 p.m. on the day of the occurrence complained of; that he was not to report back to work until 7 a.m. on the following day; that during his off-duty hours, his time was his own and that he was not "on call," that he could return to his home or go anywhere he pleased (the evidence showed that several members of the train crew did return to their homes to spend the night), the only requirement being that he report to work at 7 the following morning; that arrangements were made for those members of the crew who wanted to spend the night in Westminster to stay at a boarding house, and that the plaintiff had indicated his intention to stay there; that plaintiff, after going off duty, went

to town, that he met an outsider at a drive-in in the early afternoon, that he and several fellow crew members and the outsider got together about 4:00 p.m. and entered a caboose for the purpose of playing poker; that it was against company rules for the plaintiff, an engineer, to enter the caboose for any purposes, whether to work or to rest and recuperate, the use of the caboose being limited to "trainmen" (conductor, flagman and brakeman); that the game lasted about two hours; that after the poker game, the other players left and the plaintiff lay down on a bunk to take a nap; that about an hour later, the plaintiff was discovered afire in the caboose; that a pint whiskey bottle with a little whiskey in it, was found in the caboose after the fire, that when the plaintiff arrived at the hospital he had alcohol on his breath and was intoxicated in the opinion of the examining doctors, and that a blood test showed that the plaintiff was under the influence of alcohol "to a considerable degree" at the time the sample was taken at 9:30 p.m., and would have been more so earlier.

[redacted]er the evidence, a finding was clearly authorized that the plaintiff, while on his own time, returned to the railroad yards on a purely personal mission to drink and play poker, and that he was wrongfully on railroad property and was not engaged in the course of his employment at the time of his injury. Atchison, T. & S. F. R. Co. v. Wottle, 193 F2d 628, supra.

The plaintiff on the other hand introduced conflicting evidence showing that the defendant pro-

vided this caboose both as a place for conducting business of the defendant and as a place to be used by its employees in outlying points to rest and recuperate to better prepare themselves for their next work assignments, that by custom engineers were allowed to use this facility as well as other employees, and that the plaintiff had gone into the caboose for the purpose of resting and recuperating and had not drunk any intoxicating beverages there. The plaintiff also contended that he was subject to call on an emergency basis, and that it was to the defendant's convenience and benefit for him to remain overnight in Westminster.

If the jury accepted the plaintiff's contentions in this matter, then under the decisions of the Federal courts in such cases as Mostyn v. Delaware, L. & W. R. Co., 160 F2d 15; Casso v. Pennsylvania R. Co., 219 F2d 303; and Carney v. Pittsburgh & Lake Erie R. Co., 316 F2d 277, a finding was authorized that the plaintiff was engaged in the course of his employment at the time of his injury and that the Federal Employers' Liability Act was applicable to this action. The court in the Mostyn case, supra, while recognizing the rule that any activity undertaken by an employee for a private purpose is not within his employment under the Federal Employers' Liability Act, held that when a railroad provides shelter, or food, or both, for its employees and they are using the accommodations so provided to prepare themselves for their work, or to rest and recuperate, they must be regarded as in "the employ" of the railroad within the Federal Employers' Liability Act.

Clearly, however, the defendant railroad had the right to put in issue by its pleadings the question of the applicability of the Federal Employers' Liability Act to this action and, under the conflicting evidence in this case, the determination of this issue was one of fact for the jury and not one of law for the court. The trial court erred therefore, both in its original order sustaining the demurrers to paragraph 22 of the defendant's answer which contained valid defenses to this action if the Federal Employers' Liability Act was found to be inapplicable here, and in its subsequent order refusing to allow the defendant to amend its answer and reinstate these defenses.

3. Under recent decisions of the United States Supreme Court in such cases as Rogers v. Missouri Pacific R. Co., 352 U.S. 500 (77 SC 443, 1 LE2d 493); Webb v. Illinois Central R. Co., 352 U.S. 512 (77 SC 451, 1 LE2d 503); Gallick v. Baltimore & O. R. Co., 372 U.S. 108 (83 SC 659, 9 LE2d 618); and Meeks v. Georgia, Sou. & F. R. Co., 377 U.S. 405 (84 SC 1628, 12 LE2d 495), reversing *Georgia Sou. & F. R. Co. v. Meeks,* 108 Ga. App. 808 (134 SE2d 555), it cannot be said that a verdict for the defendant railroad was demanded by the evidence on the issues of negligence and proximate cause; and the trial court did not err in denying its motion for judgment notwithstanding the verdict.

4. Since this case is being reversed on other grounds and must be tried again, it is unnecessary to consider the assignment of error on the denial of the defendant's amended motion for new trial.

However, we have reviewed the special grounds of the amended motion and find that the trial court erred as contended in special ground 4 in its charge on the Federal Employers' Liability Act since such charge was apparently given under the erroneous impression that said Act was applicable to this suit as a matter of law and likely conveyed that impression to the jury.

The trial court also erred as contended in special ground 5 in failing to include in its instructions on determining the preponderance of evidence under *Code* § 38-107 the fact that the jury could consider the intelligence of the witnesses and the number of witnesses testifying on a material issue. *Edge v. Dorsey,* 78 Ga. App. 70, 74 (50 SE2d 227); *Garner v. Wood,* 188 Ga. 463 (4 SE2d 137); *Tucker v. Talmadge,* 186 Ga. 798 (6) (198 SE 726). While such omission standing alone is not always reversible error, the better practice is to charge the entire Code section. *Fountain v. McCallum,* 194 Ga. 269 (12) (21 SE2d 610); *Yellow Cab Co. v. McCullers,* 98 Ga. App. 601 (106 SE2d 535); *Southern R. System v. Yancey,* 102 Ga. App. 159 (115 SE2d 693).

The remaining special grounds are without merit.

Judgment affirmed in part, reversed in part. Felton, C. J., and Deen, J., concur.

On Motion for Rehearing.

It is contended by the plaintiff on motion for rehearing that this court, in holding that the trial court erred in striking the defendant's plea of the Georgia

statute of limitation and the contributory negligence law of South Carolina, overlooked the fact that "the exclusive remedy afforded an injured railroad worker is the Federal Employers' Liability Act," and that in an action to recover under the provisions of that Act, the Federal law furnishes the sole and exclusive measure of the rights and liabilities of the parties and supersedes and prohibits rights and defenses arising under State law.

This argument is based on an erroneous assumption of law and is without merit. The Federal Employers' Liability Act is not "the exclusive remedy afforded an injured railroad worker." Recovery may be had in a proper case under State law or common law principles where the Federal Employers' Liability Act is found to be inapplicable because of the absence of facts essential to bring the case within the purview of the Federal Act; that is, when it is not established that the employee was injured while engaged in the furtherance of interstate commerce and while acting within the scope of his employment. This is clearly recognized by the decisions of the United States Supreme Court in the cases of Wabash R. Co. v. Hayes, 234 U.S. 86 (34 SC 729, 58 LE 1226) and Boston & Maine R. Co. v. Armburg, 285 U.S. 234 (52 SC 336, 76 LE 729).

Thus, while this Act where applicable does supersede State law and furnishes the sole measure of the rights and liabilities of the parties, it "does not supersede the common and statutory law of the several States to such an extent that an employee of an interstate carrier must recover under that Act

or not at all, whether within the terms of the Federal Act or not," 35 Am. Jur. 878, Master & Servant, § 461. A petition stating a good cause of action under the Federal Employers' Liability Act may, when the cause of action fails for want of proof of some fact essential to bring the claim within the Federal Employers' Liability Act, be treated as affording a basis for a recovery under the State law if the plaintiff has made out a good cause of action thereunder. Wabash R. Co. v. Hayes, 234 U.S. 86, supra; Jenkins v. Southern R.-Carolina Div., 152 S.C. 386 (150 SE 128, 66 ALR 416); *Atkinson v. Bullard,* 14 Ga. App. 69 (80 SE 220); *Atlantic C. L. R. Co. v. Frierson,* 60 Ga. App. 465 (4 SE2d 131).

As pointed out in 35 Am. Jur. 878, Master & Servant, § 461, it is held in some States that a plaintiff who has alleged facts giving rise to a good cause of action under both the Federal Employers' Liability Act and State law, must make an election as to which he shall attempt to prove, but such is not the law in this State. Under Georgia practice, recovery is had under the law applicable to the facts proved, whether it be State or Federal, and it is not necessary "for the plaintiff to affirmatively allege her right to recover under any particular law, either State or Federal. If her petition set forth facts which entitled her to recover under any law which the court had jurisdiction to apply, this was all that was necessary." *Atkinson v. Bullard,* 14 Ga. App. 69, 70, *supra.*

This court did not overlook the established principle that the Federal Act *where applicable* supersedes State law. It was specifically recognized in

the original opinion that defenses arising under State law are nullified and prohibited by the Federal Employers' Liability Act when such law is applicable; and the defendant's right to assert these defenses was held to be a conditional one only, subject to proof of the non-applicability of the Federal Employers' Liability Act to this action. Since under Georgia practice, a plaintiff is not required to elect to proceed exclusively under the Federal Employers' Liability Act but may recover under whatever law is shown by the evidence to be controlling, it necessarily follows that a defendant must likewise be accorded the right to rely on State law to defeat the plaintiff's action provided that it can be shown that the Federal Employers' Liability Act is not applicable.

We therefore adhere to our original ruling that the trial court committed reversible error in striking these conditional defenses and in refusing to reinstate them after the introduction of evidence which authorized the finding that the Federal Employers' Liability Act was not applicable to this action.

Motion for rehearing denied.

APPENDIX B.

COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA, October 19, 1965

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

Southern Railway Co. v. E. H. Smalley

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA

Clerk's Office, Atlanta,

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

APPENDIX C.

SUPREME COURT OF GEORGIA

Atlanta, January 17, 1966

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:

Edward H. Smalley v. Southern Railway Company.

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

Bill of Costs, $15.00.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that Lewis, Lewis & Cagle paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

HENRY H. COBB,
Clerk.

CASE NO. 41341

COURT OF APPEALS OF GEORGIA

REMITTITUR FROM SUPREME COURT

Filed in office January 31, 1966

MORGAN THOMAS,
Clerk Court of Appeals of
Georgia

APPENDIX D.

IN THE COURT OF APPEALS OF GEORGIA

No. 41341

SOUTHERN RAILWAY COMPANY,
Plaintiff-in-Error

vs.

EDWARD H. SMALLEY,
Defendant-in-Error

TO THE COURT OF APPEALS OF GEORGIA:

It is the desire and the bona fide intention of the Defendant-in-Error in the above-stated case to petition the United States Supreme Court for a writ of certiorari to the Court of Appeals of Georgia to review and reverse the decision of the latter. Petitioner, therefore, respectfully requests that an order issue granting a stay of the remittitur in this case for a period of ninety (90) days from the date of denial by the Supreme Court of Georgia of his petition for writ of certiorari, i.e., January 17, 1966.

Respectfully submitted,
T. J. LEWIS, Jr.
(T. J. Lewis, Jr.),
JEAN E. JOHNSON, SR.,
(Jean E. Johnson, Sr.),
Attorneys for Defendant-in-Error

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing the same in the United States Mail in a properly addressed envelope with adequate postage thereon.

This 19th day of January, 1966.

T. J. LEWIS, JR.
Attorney for Defendant-in-Error

APPENDIX E.

Sec. 1257. Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, C. 646, 62 Stat. 929.

APPENDIX F.

THE FEDERAL EMPLOYERS' LIABILITY ACT.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1. 53 Stat. 1404, 45 U. S. Code, Sec. 51,

APPENDIX G.

CONTRIBUTORY NEGLIGENCE; DIMINUTION OF DAMAGES.

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 3, 35 Stat. 66, 45 U. S. Code, Sec. 53.

APPENDIX H.

ASSUMPTION OF RISKS OF EMPLOYMENT.

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404, 45 U. S. Code, Sec. 54.

APPENDIX I.

ACTIONS; LIMITATIONS; CONCURRENT JURISDICTION OF COURTS

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, Section 6, 35 Stat. 66; Apr. 5, 1910, c. 143, Section 1, 36 Stat. 291; Mar. 3, 1911, c. 231, Section 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, Section 2, 53 Stat. 1404; June 25, 1948, c. 646, Section 18, 62 Stat. 989.

APPENDIX J.

DETERMINATION OF WHERE PREPONDERANCE OF EVIDENCE LIES.

In determining where the preponderance of evidence lies, the jury may consider all the facts and circumstances of the case, the witnesses' manner of testifying, their intelligence, their means and opportunity for knowing the facts to which they testified, the nature of the facts to which they testified, and the probability or improbability of their testimony, their interest or want of interest, and also their personal credibility so far as the same may appear from the trial. The jury may also consider the number of witnesses, though the preponderance is not necessarily with the greater number. Georgia Code: 38-107